Supreme Court, U.S.
FILED

96 742 SEP 3 1996

OFFICE OF THE CLERK

No. 96-_____

IN THE

Supreme Court of the United States
OCTOBER TERM, 1996

BREAST IMPLANT TORT CLAIMANTS REPRESENTED BY O'QUINN, KERENSKY, MCANINCH & LAMINACK

Petitioners,

v.

DOW CORNING CORPORATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOHN M. O'QUINN
Counsel of Record
RICHARD N. LAMINACK
O'QUINN, KERENSKY,
MCANINCH & LAMINACK
440 Louisiana, Suite 2300
Houston, TX 77002
(713) 223-1000
(713) 236-4870 (fax)

JOSEPH F. RICE
RICHARD L. AKEL
NESS, MOTLEY, LOADHOLT,
RICHARDSON & POOLE
P.O. Box 1137
Charleston, SC 29402
(803) 720-9000
(803) 577-7513 (fax)

ATTORNEYS FOR PETITIONERS BREAST IMPLANT TORT CLAIMANTS REPRESENTED BY O'QUINN, KERENSKY, McANINCH & LAMINACK

November 8, 1996

WPP

QUESTIONS PRESENTED

1. Whether a district court in which a bankruptcy Chapter 11 case is pending against a tortfeasor debtor corporation is authorized or required to exercise jurisdiction over suits against non-debtor joint tortfeasors on the ground that these suits are "related to" the bankruptcy under 28 U.S.C. §1334(b) based upon the right of the nondebtors to pursue claims for contribution against the debtor corporation.

2. Whether 28 U.S.C. §157(b)(5) empowers a district court in which a Chapter 11 bankruptcy case is pending against a tortfeasor debtor corporation to transfer to itself, from state courts throughout the country, cases pending against alleged nondebtor joint tortfeasors.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties listed in the caption, the following parties participated in proceedings in the Sixth Circuit: Heidi Lindsey; Johnson County, Texas, Plaintiffs; Breast Implant Tort Claimants Represented by O'Quinn, Kerensky, McAninch & Laminack (Petitioners herein); Office of the United States Trustee; California Plaintiffs' Steering Committee, *as amicus curiae;* Official Committee of Unsecured Creditors, as Intervenor.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	8
1. THE COURT OF APPEALS' INTERPRETATION AND APPLICATION OF 28 U.S.C. §1334(b) CONFLICTS WITH THAT OF THE SECOND, THIRD, SEVENTH AND ELEVENTH CIRCUITS	8
2. THE DECISION OF THE COURT OF APPEALS IS CLEARLY ERRONEOUS	11
(a) SIXTH CIRCUIT'S INTERPRETATION OF 28 U.S.C. §1334(b) IS CLEARLY ERRONEOUS	12
(b) SIXTH CIRCUIT'S INTERPRETATION OF 28 U.S.C. §157(b)(5) IS CLEARLY ERRONEOUS	17
CONCLUSION	20

APPENDIX 22

JUNE 3, 1986, AMENDED OPINION OF SIXTH CIRCUIT COURT OF APPEALS 1a

JUNE 3, 1996, ORDER OF SIXTH CIRCUIT COURT OF APPEALS 31a

TABLE OF AUTHORITIES

CASES **Page**

A.H. Robins Co., Inc. v. Piccinin,
788 F.2d 994 (4th Cir. 1986),
cert. denied, 479 U.S. 876 (1986) 14, 19

In re American Energy, Inc.,
50 B.R. 175 (Bankr. N.D. 1985) 14

Board of Governors v. MCorp Financial,
502 U.S. 32, 112 S.Ct. 459,
116 L.Ed.2d 358 (1991) 10

Celotex Corp. v. Edwards,
____ U.S. ____, 115 S.Ct. 1493 (1995) 6, 8, 10, 16, 17

In the Matter of Fedpak Systems, Inc.,
80 F.3d 207 (7th Cir. 1996) 8, 10, 15

In re Fietz,
852 F.2d 455 (9th Cir. 1988) 10

Fortier v. Dona Anna Plaza Partners,
747 F.2d 1324 (10th Cir. 1984) 14

Home Insurance Co. v. Cooper & Cooper, Ltd.,
889 F.2d 746 (7th Cir. 1989) 9

In re Lemco Gypsum, Inc.,
910 F.2d 784 (11th Cir. 1990) 10

In the Matter of Lockard,
884 F.2d 1171 (9th Cir. 1989) 14

Lynch v. Johns-Manville Sales Corporation,
710 F.2d 1194 (6th Cir. 1983) 13, 14

Maritime Electric Co., Inc. v. United Jersey Bank,
959 F.2d 1194 (3rd Cir. 1991) 14

Mattingly v. Newport Offshore, Ltd.,
57 B.R. 797 (D. Rh.I. 1986)..... 16

In re Memorial Estates, Inc.,
950 F.2d 1364 (7th Cir. 1992),
cert. denied, 504 U.S. 986, 112 S.Ct. 2969,
119 L.Ed. 2d 589 (1992)..... 9

New York State Conference of Blue Cross v.
Travelers Insurance, ____ U.S. ____,
115 S.Ct. 1671 (1995)..... 15

Page

Pacor, Inc. v. Higgins,
743 F.2d 984 (3rd Cir. 1984) ..... *passim*

In re Pan American Corp.,
950 F.2d 839 (2nd Cir. 1991) 16

Robinson v. Michigan Consolidated
Gas Co., Inc., 918 F.2d 579 (6th Cir. 1990) 6

Roe v. Wade,
410 U.S. 113, 93 S.Ct. 705,
35 L.Ed.2d 147 (1973) 2

Southern Pacific Terminal Co. v. ICC,
219 U.S. 498, 31 S.Ct. 279,
55 L.Ed. 310 (1911) 2

Teachers Insurance & Annuity Association
of America v. Butler, 803 F.2d 61 (2nd Cir. 1986) 14

In re Turner, 724 F.2d 338 (2nd Cir. 1983) 9, 10

In re United States Lines,
128 B.R. 339 (S.D.N.Y. 1991) 18

Younger v. Harris,
401 U.S. 37, 91 S.Ct. 746,
27 L.Ed.2d 669 (1971) 16

In re White Motor Credit,
761 F.2d 270 (6th Cir. 1985) 16

In re Wood,
825 F.2d 90 (5th Cir. 1987) 10

In re Xonics, Inc., 813 F.2d 127 (7th Cir. 1987) 9, 10

Zerand-Bernal Group, Inc. v. Cox,
23 F.3d 159 (7th Cir. 1994) 15

STATUTES

	Page
11 U.S.C. §105	5
11 U.S.C. §362	14
11 U.S.C. §362(a)	13, 14, 18
11 U.S.C. §362(a)(1)	14
28 U.S.C. §157(b)(2)(B)	18
28 U.S.C. §157(b)(5)	*passim*
28 U.S.C. §1254(1)	2
28 U.S.C. §1334(b)	*passim*
28 U.S.C. §1334(c)	2, 7, 16
28 U.S.C. §1367(a)	6
28 U.S.C. §1407	19
28 U.S.C. §1452	6
28 U.S.C. §1471(b)	6, 9, 15
Cal. Civ. Code §1431	13
Cal. Civ. Code §1431.2	13

SECONDARY SOURCES

Richard B. Sobol, *Bending the Law: The Story of the Dalkon Shield Bankruptcy* 66 (1991) 19

Prosser and Keeton on the Law of Torts, §50 at 338 (5th ed. 1984) 12

Restatement (Second) of Torts, §886(A)(1979) 12

The Bottomless Pit of Bankruptcy Jurisdiction, 112 Banking L.J. 957 (Nov.-Dec. 1995) 15

130 Cong. Rec. 8891, 8896, 8889 (June 29, 1984)(Statement of Sens. Dole and Hatch) 16

PETITION FOR WRIT OF CERTIORARI

Petitioners[1] respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit issued on June 3, 1996, which reversed the holding of the United States District Court for the Eastern District of Michigan that the district court lacked subject matter jurisdiction under the Bankruptcy Code over thousands of state court tort claims pending against nondebtor defendants in courts across the country.

OPINIONS BELOW

The district court issued two opinions on September 12, 1995, that were the subject of Respondents' appeals to the Sixth Circuit: The first, addressing the debtor Dow Corning Corporation's motion to transfer claims pending against its corporate parents, Dow Chemical Company ("Dow Chemical") and Corning Incorporated ("Corning"), is reported at 187 B.R. 919. The second opinion, addressing motions by three unrelated Defendants, Baxter International Incorporated ("Baxter"), Minnesota Mining & Manufacturing Company ("3M"), and Bristol-Myers Squibb Company and Medical Engineering Corporation (together "Bristol Myers"), is reported at 187 B.R. 934. The Sixth Circuit reversed the district court in a decision issued on April 9, 1996. The decision, reported at 81 F.3d 635, was withdrawn in favor of an amended opinion issued on June 3, 1996, and reported at 86 F.3d 482 and is reprinted at 1a-30a; the accompanying order is reprinted at 31a-32a.

---

[1] Petitioners are Breast Implant Tort Claimants Represented by O'Quinn, Kerensky, McAninch & Laminack. These Petitioners fully participated in the proceedings below. Counsel of record (John M. O'Quinn) presented oral argument on behalf of these Petitioners to the Sixth Circuit Court of Appeals with Marvin Frankel (counsel of record for Petitioner Official Committee of Tort Claimants) which has also filed Petition for Writ of Certiorari.

JURISDICTION

The decision of the Sixth Circuit reversing the decisions of the district court was issued on April 9, 1996. A timely petition for rehearing was filed on April 22, 1996, and denied on June 3, 1996, when the Sixth Circuit issued its amended opinion. This Court has jurisdiction to grant a writ of certiorari pursuant to 28 U.S.C. §1254(1).[2]

STATUTES INVOLVED

Two statutory provisions are principally involved in this case.

1. 28 U.S.C. §1334(b), which in relevant part grants federal court jurisdiction over claims "related to" a debtor's bankruptcy, provides as follows:

> Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

---

[2] The current status of the actions subject to the court of appeals' amended opinion is that, upon its determination that the district court had jurisdiction over the tort claims pending against the nondebtor defendants, and therefore, power to transfer these claims pursuant to 28 U.S.C. §157(b)(5), the court of appeals remanded to the district court to consider the issue of abstention under 28 U.S.C. §1334(c). The district court promptly remanded most of the actions, pursuant to its mandatory and discretionary abstention powers under §1334(c). These Petitioners do not believe that the jurisdictional issues the subject of this petition are moot as there continues to be a live controversy over the district court's jurisdiction under 28 U.S.C. §1334(b) with regard to the nondebtor defendants as they have appealed to the Sixth Circuit from the district court's remand order. Even assuming, *arguendo,* that the jurisdictional issues are no longer technically extant as a result of the district court's remand, they are still "capable of repetition, yet evading review", and provide "a classic justification for a conclusion of nonmootness." *Roe v. Wade,* 410 U.S. 113, 125, 93 S.Ct. 705, 713, 35 L.Ed.2d 147 (1973); *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911).

2. 28 U.S.C. §157(b)(5) provides:

> The district court shall order that personal injury, tort, and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

STATEMENT OF THE CASE

This petition provides the Court with an opportunity to delineate the boundaries of "related to" bankruptcy jurisdiction under 28 U.S.C. §1334(b), with regard to claims asserted by injured parties against defendants which are not in bankruptcy. The petition arises out of the silicone gel breast implant litigation, one of the largest mass tort litigations in history, and concerns the claims of thousands of women who have opted out of the class action settlement to pursue their individual claims against the manufacturers of these implants. *None of these manufacturers are in bankruptcy except Dow Corning Corporation,* ("Dow Corning" or "debtor"), which filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code with the Bankruptcy Court for the Eastern District of Michigan, Northern Division, (Arthur J. Spector, J.), on May 15, 1995. Numerous claims remain pending in state and federal courts against parties not in bankruptcy which include Dow Chemical Corporation[3], Bristol-Myers Squibb Company, Medical Engineering Corporation, Baxter Healthcare Corporation, Baxter International Incorporated, and Minnesota Mining and Manufacturing Company, ("nondebtor defendants"). *No nondebtor defendant has ever asserted a contribution or indem-*

---

[3]Dow Chemical and Corning, Inc. are the owners of Dow Corning. Dow Chemical participated in the development of the technology and in the testing and research performed on silicone which ultimately became the basis for the claim that silicone is biologically inert inside the human body.

nity claim against Dow Corning with the exception of Dow Chemical, one of the debtor's corporate parents.

The original $4.25 billion silicone gel breast implant global settlement, approved September 1, 1994, by the District Court for the Northern District Court of Alabama, Southern Division, (Samuel C. Pointer, Jr., CJ), resolved current and future claims against Dow Corning and numerous other manufacturers and sellers of silicone gel breast implants, ("the global settlement").[4] However, one year later, the global settlement collapsed, due to the fact that the total amount of current claims, (approximately 440,000), exceeded the amount of money set aside for such claims ($1.2 billion), and the parties were not successful in eliminating the need for reductions in the benefits payable under the global settlement's Disease Compensation Program.[5]

When the global settlement collapsed it was not decertified by the district court, but was instead "revised" and replaced with a Revised Settlement Program.[6] Many women have opted-out of the global settlement and the Revised Settlement Program to seek compensation in state courts, which they believe are in a better position to efficiently and expeditiously resolve their individual claims. Nondebtor defendants have sought to prevent the resolution of these cases at the local level by attempting to remove and transfer them to the bankruptcy court. The actions of the nondebtor defendants in the courts below is nothing less than a concerted nationwide attempt by solvent, nonbankrupt manufacturers and sellers of silicone gel breast implants to deprive these women of their day in state court by use and abuse of federal bankruptcy provisions.

---

[4] *In re Silicone Gel Breast Implant Products Liability Litigation (MDL 926), Heidi Lindsey, et al v. Dow Corning Corporation, et al,* 1994 WL 578353 at 23 (N.D. Ala. Sept. 1, 1994).

[5] *See In re Silicone Gel Breast Implant Prods. Liab. Litig.,* MDL 926, CV 92-P-10000-S (N.D. Ala. Oct. 7, 1995) (Order No. 26).

[6] MDL 926 Order No. 27, dated December 22, 1995.

In furtherance of that strategic objective, on June 12, 1995, Dow Corning filed a motion with the bankruptcy court, pursuant to 28 U.S.C. §157(b)(5), to transfer to the District Court for the Eastern District of Michigan all breast implant claims of women that had opted out of the breast implant settlement pending against it and its shareholders, Dow Chemical and Corning, Inc.[7] Dow Chemical and Corning, Inc. joined in the motion. On June 14, 1995, the nondebtor defendants also moved, pursuant to §157(b)(5), to transfer to the District Court for the Eastern District of Michigan those opt-out cases in which they had been named as defendants along with Dow Corning. These motions requested the district court to order that the personal injury and wrongful death claims against them be tried in the district court in which the bankruptcy is pending, i.e., the District Court for the Eastern District of Michigan. *The debtor, Dow Corning, did not join in any of the transfer motions filed by the nondebtor defendants.* The primary arguments asserted by the nondebtor defendants as a basis for assumption of bankruptcy "related to" jurisdiction over claims asserted against the nondebtors by tort claimants was the existence of contingent contribution or indemnity claims against the debtor by these nondebtors, even though none of the nondebtors (other than Dow Chemical) had ever asserted such a claim against the debtor.

On September 12, 1995, the district court, (Denise Page Hood, J.), issued two opinions and companion orders regarding the transfer motions. With respect to opt-out breast implant cases pending against Dow Corning, the district court asserted jurisdiction under 28 U.S.C. §1334(b) and permitted transfer pursuant to §157(b)(5). However, with respect to claims pending against all nondebtor defendants, the district court denied the motion to transfer on the basis that the claims were not "related to" Dow

---

[7] The bankruptcy court had previously dismissed an adversary proceeding filed by Dow Corning seeking a temporary restraining order and preliminary injunction under §105 of the Bankruptcy Code barring opt-out Plaintiffs from proceeding to trial against its shareholders Dow Chemical and Corning.

Corning's bankruptcy, and the court did not have bankruptcy subject matter jurisdiction under 28 U.S.C. §1334(b).

In denying the transfer motions of the nondebtor defendants, the district court also (i) directed that individual federal courts nationwide dismiss or sever Dow Corning from claims asserted against Dow Corning and the nondebtor defendants, and remand the claims against the nondebtor defendants to state courts; and (ii) enjoined the nondebtor defendants from removing any other cases from state to federal court, pursuant to 28 U.S.C. §1452 where the only basis for such removal was 28 U.S.C. §1334(b) or 28 U.S.C. §1367(a).

In determining that it did not have subject matter jurisdiction over claims against nondebtor defendants, the district court relied upon the decisions in *Celotex Corp. v. Edwards,* ____ U.S. ____, 115 S.Ct. 1493, 1498-99 (1995); *Pacor, Inc. v. Higgins,* 743 F.2d 984, 994 (3rd Cir. 1984); and *Robinson v. Michigan Consolidated Gas Co., Inc.,* 918 F.2d 579, 583-84 (6th Cir. 1990). Both *Celotex* and *Robinson* acknowledge that the test for determining "related to" bankruptcy jurisdiction under §1334(b) is that set forth in *Pacor*, construing 28 U.S.C. §1471(b), the identical predecessor to §1334(b).

Applying the *Pacor* test to the nondebtor defendants, the district court concluded that it did not have subject matter jurisdiction under §1334(b) in light of the absence of any judgment between plaintiffs and nondebtor defendants, and the absence of any contractual or automatic basis for indemnification between the nondebtors and Dow.[8] The district court also rejected the motions of nondebtor defendants on the grounds of judicial economy, stating that judicial economy alone does not justify the assumption of jurisdiction over non-bankruptcy actions

---

[8] The district court correctly observed that: "In the instant case, as in *Pacor,* there would be no contingent claim by the non-debtors against the Debtor for indemnification until such time as a judgment is rendered. Even then, the non-debtors would have to proceed with an entirely separate proceeding in order to obtain indemnification from the Debtor before the Bankruptcy Court." Memorandum Opinion and Order on the Nondebtor Motions to Transfer at 4.

involving the nondebtor defendants, (also citing *Pacor,* 743 F.2d at 994).

The court of appeals reversed, holding that the district court had subject matter jurisdiction over the opt-out cases sought to be transferred because they are "related to" Dow Corning's bankruptcy. The circuit court held that such jurisdiction existed with respect to claims against all the defendants because of the possibility that such parties might pursue claims for contribution in the debtor's bankruptcy, even though the court of appeals acknowledged that the nondebtors (with the exception of debtor's parent corporations) had *never* asserted a claim for contribution or indemnity against Dow Corning. 86 F.3d at 493-94.[9] The Sixth Circuit remanded the case for further consideration of the transfer motions under §157(b)(5), directing the district court to undertake an abstention analysis under §1334(c). *Id.* at 497.[10]

The Sixth Circuit also rejected the petitioner's argument that 28 U.S.C. §157(b)(5), the statute under which respondents sought a "transfer" of the nondebtor claims, does not speak of or provide for any such transfer. As against the textual language and legislative history as argued by petitioners, the decision stands as the first and only one permitting use of §157(b)(5) to effect a mass transfer of litigation against unrelated corporate tortfeasors in circumstances such as these.

---

[9] The Sixth Circuit adverted to a second ground for "related to" jurisdiction, but only with respect to claims against Dow Chemical and Corning, the Debtor's corporate parents: the potential impact of nondebtor claims on insurance jointly held by the Debtor and its parents. 86 F.3d at 494-95. Since this ground could not be asserted as a basis for "related to" jurisdiction over claims against non-shareholder nondebtors, a reversal of the Sixth Circuit's judgment as to those parties would follow automatically from a determination by this Court that the prospect of contribution claims does not itself establish such jurisdiction. With respect to claims against the Debtor's corporate parents, we believe the appropriate disposition would then be reversal with a remand to determine whether the insurance factor alone is sufficient to establish "related to" jurisdiction over the claims asserted against Dow Chemical and Corning.

[10] The district court has now determined on remand, that both mandatory and permissive abstention apply to all claims asserted against the nondebtors (including Dow Chemical and Corning). The decision is being appealed by the nondebtors.

Thus, the court of appeals authorized subject matter "related to" jurisdiction over claims between plaintiffs and nondebtor defendants where there is only the remote possibility that those claims will ever have an effect on the debtor's estate. Such an unprecedented, broad sweeping interpretation of "related to" jurisdiction threatens to convert into a bankruptcy proceeding every lawsuit where there exists the possibility (however remote) that the debtor's estate might be impacted by the random side effects of the litigation between plaintiff and nondebtor defendants.

REASONS FOR GRANTING THE PETITION

This petition should be granted because there is a conflict amongst the circuits and the state of the law is now confusing and unclear.

1. The Court of Appeals' Interpretation and Application of 28 U.S.C. §1334(b) Conflicts With That of the Second, Third, Seventh and Eleventh Circuits.

Although purporting to follow the decision in *Pacor, supra,* which has been adopted in the majority of circuits, (*See Celotex Corporation v. Edwards, supra*), the Sixth Circuit has gone well beyond the boundaries of *Pacor* in authorizing "related to" bankruptcy jurisdiction in circumstances where the Third Circuit in *Pacor* expressly declined to do so, in the absence of a contractual guaranty or an agreement to indemnify provided by the debtor creating a mature claim for contribution or indemnity affecting the debtor's estate. 743 F.2d at 995.

The Sixth Circuit's decision is in conflict with that of the Second, Third, Seventh, and Eleventh Circuits, whose decisions indicate that "related to" jurisdiction would not exist in similar circumstances. As the Seventh Circuit stated in *In the Matter of Fedpak Systems, Inc.,* 80 F.3d 207, 213 (7th Cir. 1996):

> Whether Fedpak's seeking of a clarification order falls within the jurisdiction of the bankruptcy court depends in part upon how one interprets the "related to" language in 28 U.S.C. §§157(a) and 1334(b). The circuits are split on how best to interpret this statutory language .... Some courts have adopted a sweeping test which holds that whenever a proceeding "*could conceivably have any effect on the [bankruptcy] estate*," it is "related to" a case under title 11 and the bankruptcy court has jurisdiction. *See* e.g. *Pacor, Inc. v. Higgins* ... This circuit has articulated a more limited and, we believe, more helpful definition of the bankruptcy court's "related to" jurisdiction. Our precedents hold that "[a] case is 'related' to a bankruptcy when the dispute 'affects the amount of property for distribution [i.e. the debtor's estate] or the allocation of property among creditors.' "

Id. at 213-14. (*emphasis added, citations omitted*).

See also: Second Circuit: *In re Turner,* 724 F.2d 338, 341 (2nd Cir. 1983) (referring to the "conceivable effect" test in *Pacor* but requiring that there be a "significant connection" with the bankruptcy); Third Circuit: *Pacor; supra,* 743 F.2d at 995, in which the mere existence of a potential third party claim for indemnity did not satisfy the "conceivable effect" and therefore did not justify "related to" bankruptcy jurisdiction under 28 U.S.C. §1471(b), the identical predecessor to 28 U.S.C. §1334(b); Seventh Circuit: *In re Memorial Estates, Inc.,* 950 F.2d 1364, 1368 (7th Cir. 1992), *cert. denied,* 504 U.S. 986, 112 S.Ct. 2969, 119 L.Ed. 2d 589 (1992); *In re Xonics Inc.,* 813 F.2d 127, 131 (7th Cir. 1987) ("related to" jurisdiction exists when a dispute affects the amount of property available for distribution or allocation among creditors); *Home Insurance Co. v. Cooper & Cooper, Ltd.,* 889 F.2d 746, 749 (7th Cir. 1989) (following *Xonics* and stating that "We have read §157(c) [relating to bankruptcy judge's function] narrowly not only out of respect for Article III but also to preserve the

jurisdiction of state courts over questions of state law involving persons not party to the bankruptcy"); *In the Matter of Fedpak Systems, Inc., supra.,* following the foregoing Seventh Circuit authorities; Eleventh Circuit: *In re Lemco Gypsum, Inc.,* 910 F.2d 784 (11th Cir. 1990) (stating that "The bankruptcy jurisdiction is designed to provide a single forum for dealing with all claims to the bankrupt's assets, but it cannot be extended beyond its purpose," *Id.* at 789-90, and noting that the Second and Seventh Circuits, (and formerly the Sixth Circuit), have "related to" formulations that "may deny jurisdiction in cases where the dispute's probable effect on the debtor's estate, while conceivable, is nonetheless remote," citing *In re Turner* and *In re Xonics, Id.* at 788, n.19).

The Sixth Circuit's position also conflicts with *Celotex, supra,* in which this Court stated: "We also agree with that Court's observation that a bankruptcy court's 'related to' jurisdiction cannot be limitless." *Supra,* 115 S.Ct. at 1499. *See Pacor, supra* at 994; *Board of Governors v. MCorp Financial,* 502 U.S. 32, 40, 112 S.Ct. 459, 464, 116 L.Ed.2d 358 (1991) (stating that Congress has "vested limited authority" in bankruptcy courts).

Although no circuit other than the Sixth Circuit has gone so far as to extend "related to" jurisdiction based on potential or unasserted claims for contribution, at least two circuits have adopted an expansive interpretation of §1334(b) that brings them into conflict with the approach adopted by the Third and Seventh Circuits, if not the Second and Eleventh Circuits as well. *See In re Wood,* 825 F.2d 90, 93-94 (5th Cir. 1987) (holding that subject matter jurisdiction existed on the ground that, "[a]lthough we acknowledge the possibility that this suit may ultimately have no effect on the bankruptcy, we cannot conclude . . . that it will have no *conceivable* effect." (*emphasis in original*)); *In re Fietz,* 852 F.2d 455, 457 (9th Cir. 1988) (stating that although other circuits "have adopted definitions similar to the one announced in *Pacor* . . . their formulations may deny jurisdiction in cases where the dispute is "conceivably" related to

the bankruptcy estate, but that relationship is remote . . . We reject any limitation on this definition . . .").

This disparity between these circuits is by no means a superficial or contrived "conflict" but is real, material and of profound consequence, particularly in the class action context and other multi-party litigation where the outcome of the jurisdictional question can subject a multitude of claims against nondebtors to bankruptcy jurisdiction. While the court of appeals purports to follow the "conceivable effect" test in *Pacor,* the outcome differential that now exists between it and certain other circuits is not simply one of minor degrees of separation based on distinguishable facts. There is now a fundamental divergence over when the federal courts may assume bankruptcy jurisdiction based on potential but non-ripe claims for contribution and indemnity, in litigation where there is at least one debtor, whether named as a defendant or not. Clearly, the Third and Seventh Circuits would not authorize jurisdiction in such circumstances, whereas the Sixth Circuit would. It also appears that the Second and Eleventh Circuits would not extend jurisdiction in similar circumstances.

In view of the jurisdictional and managerial implications for major multi-party litigation, this case provides a timely opportunity to provide guidance and promote uniformity as to when the federal courts may exercise bankruptcy jurisdiction over claims that lack any other basis for federal intervention.

2. The Decision of the Court of Appeals is Clearly Erroneous.

The court of appeals' decision is clearly erroneous, and that error will have serious consequences if perpetuated by the Sixth Circuit and followed in other circuits. The decision results in virtually limitless subject matter bankruptcy jurisdiction for the district courts in those circumstances where there is at least one bankrupt wrongdoer, whether named as a defendant or not.

(a) Sixth Circuit's Interpretation of 28 U.S.C. §1334(b) is Clearly Erroneous.

The court of appeal's decision is premised on the opinion that a finding of definite third party liability against a debtor is not a condition precedent to holding an action related to a bankruptcy proceeding, and that the existence of contingent claims, which could ripen into fixed claims, justifies "related to" jurisdiction. 86 F.3d at 490-494. In contrast, it is apparent from *Pacor* that a potential claim for indemnity or contribution does not support "related to" jurisdiction. In *Pacor,* the Third Circuit held that a potential third party claim for indemnity that the defendant asbestos seller might have against the bankrupt manufacturer of the product did not justify the assumption of "related to" jurisdiction. The decision in *Pacor* is important not only for its articulation of the test for determining "related to" jurisdiction but also in defining the boundaries of that jurisdiction.

The Third Circuit's reasoning applies with equal force in support of this petition: there are no judgments between plaintiffs and nondebtor defendants; there are no third party judgments between nondebtor defendants and Dow Corning; there are no contractual indemnity relationships between nondebtor defendants and Dow Corning. In short, there is no nexus between the nondebtor defendants and the debtor's estate sufficient to justify "related to" jurisdiction over the breast implant claims against the nondebtor defendants.

The prospect of "related to" jurisdiction even in circumstances where there is a debtor tortfeasor that is not named as a defendant but can be jointly and severally liable with other named tortfeasors is particularly disturbing. Although the statutes of some jurisdictions limit contribution to those against whom judgments have been rendered, fixing both liability and amount, others do not. *Prosser & Keeton on the Law of Torts,* Section 50 at 338-39 (5th ed. 1984); *Restatement (Second) of Torts,* Section 886(A), articulating principles governing contribution among tortfeasors. (As Comment b. to Section 886(A)(1)

states, "It is not necessary that [tortfeasors] act in concert or in pursuance of a common design, nor is it necessary that they be joined as defendants.") Moreover, "It is beyond peradventure that joint tortfeasors are not indispensable parties in the federal forum." *Lynch v. Johns-Manville Sales Corporation,* 710 F.2d 1194, 1198 (6th Cir. 1983). Thus, in a suit in which a debtor tortfeasor is not named but may nevertheless be jointly and severally liable for all of the plaintiff's damages, or only a portion thereof, (for example, economic damages in cases of personal injury, property damage, or wrongful death, as under Cal. Civ. Code §§1431 and 1431.2), a potential (and even unasserted) claim for contribution against an unnamed debtor tortfeasor would invoke "related to" jurisdiction under the Sixth Circuit's decision.

The Sixth Circuit has created a future scenario for manipulation and abuse of the Bankruptcy Code to benefit nondebtors to the detriment of both the bankrupt debtor and tort claimants. This Sixth Circuit decision creates bankruptcy "related to" jurisdiction based on nothing more than the existence of joint and several liability allegations in a lawsuit. Nondebtors may now seek bankruptcy transfer by virtue of the filing of bankruptcy by any defendant alleged to be jointly and severally liable on the basis of nothing more than the potential for contingent contribution claims against the debtor. Co-defendants may now collude to "sacrifice" a defendant to bankruptcy in order to obtain transfer of all claims asserted against the non-bankrupt parties.

To the extent that the court of appeals is concerned with the protection of the assets of the bankrupt's estate, the automatic stay provisions of §362(a) of the Bankruptcy Code, 11 U.S.C. §362(a), enables the bankruptcy court to effectively protect these assets, and to promote an orderly reorganization or liquidation of the debtor's estate.

However, the Sixth Circuit's decision is inconsistent with many decisions which have repeatedly held that bankruptcy courts should not exercise jurisdiction over claims against nondebtors by extension of the automatic stay provisions of the

Bankruptcy Code, 11 U.S.C. §362. *See Lynch v. Johns-Manville Sales Corporation,* 710 F.2d 1194, 1197 (6th Cir. 1983); *Fortier v. Dona Anna Plaza Partners,* 747 F.2d 1324, 1330 (10th Cir. 1984); *Teachers Insurance & Annuity Association of America v. Butler,* 803 F.2d 61, 65 (2nd Cir. 1986); *Maritime Electric Co., Inc. v. United Jersey Bank,* 959 F.2d 1194, 1205 (3rd Cir. 1991) (referring to numerous authorities).

Only in unusual situations will a stay under §362(a)(1) be extended to a nondebtor defendant, for example, where a judgment against a solvent defendant would effectively constitute a judgment or finding against a debtor as a result of the debtor's contractual or statutory obligation to indemnify the nondebtor defendant, and even then an arguably unusual situation may not be recognized as grounds for extending the stay. *See A.H. Robins Co., Inc. v. Piccinin,* 788 F.2d 994, 999-1001 (4th Cir. 1986), *cert. denied,* 479 U.S. 876 (1986) (recognizing "unusual situation" exception); *In the Matter of Lockard,* 884 F.2d 1171, 1179 (9th Cir. 1989) (declining to recognize "unusual situation" exception.)

This recognition of the need for limitations on bankruptcy jurisdiction within the context of 11 U.S.C. §362(a) in order to strike a careful balance between the rights of plaintiffs, the obligations of solvent defendants, and the protection of debtor defendants, is equally relevant to the application of "related to" jurisdiction under 28 U.S.C. §1334(b).[11]

The inevitable consequence of the court of appeals' wholesale extension of jurisdiction was perhaps best described by the bankruptcy court in *In re American Energy, Inc.,* 50 B.R. 175, 179 (Bankr. N.D. 1985). The court's observations are as apposite

---

[11] In *A.H. Robbins, supra,* 743 F.2d at 995, the court, in considering the application of the stay provisions of 11 U.S.C. §362(a)(1), referred to the jurisdictional limitations of 28 U.S.C. §1334(b) recognized in *Pacor.*

today as they were when made with reference to the former §1471(b):

> Giving a very broad definition to the term ["related"] would transform every state-created cause of action into a federal matter merely because a debtor were involved, *but this would be a jurisdictionally infirm construction.* . . . This Court has taken the position in related proceedings based solely on state created contract law that the clear expression of both the United States Supreme Court and Congress cannot be ignored. . . . Such cases, although tangentially related to a pending bankruptcy proceeding, are not sufficiently related to the proceeding to confer jurisdiction on the bankruptcy court under 28 U.S.C. §157(c)(1) unless there also exists an independent basis for federal jurisdiction.

Id. at 179. *(emphasis added; citations omitted)*

Or, as the court explained in *In the Matter of Fedpak Systems, Inc.*, "We have interpreted 'related to' jurisdiction narrowly 'out of respect for Article III' . . . as well as to prevent the expansion of federal jurisdiction over disputes that are best resolved by the state courts . . . *Additionally, we believe that common sense cautions against an open-ended interpretation of the 'related to' statutory language 'in a universe where everything is related to everything else.'* Gerald T. Dunne, *The Bottomless Pit of Bankruptcy Jurisdiction,* 112 Banking L.J. 957 (Nov.-Dec. 1995) . . . 'A court cannot write its own jurisdictional ticket. *Zerand-Bernal* at 164.' *supra,* 80 F.3d at 214-15 *(emphasis added)*[12].[12] *See also New York State Conference of Blue Cross v. Travelers Insurance,* ____ U.S. ____ 115 S.Ct. 1671, 1677 (1995) (recognizing that if the term "related to" was taken to extend to the furthest stretch of its indeterminacy, same would never run its course because relations stop nowhere).

---

[12]Referring to *Zerand-Bernal Group, Inc. v. Cox,* 23 F.3d 159 (7th Cir. 1994).

Moreover, while it may well be that Congress intended a broad jurisdictional grant under §1334(b), it could not have intended the wholesale transfer of authority that results from the court of appeals' decision in this case. In their legislative debate that accompanied the 1984 Bill, both Senators Dole and Hatch emphasized that the legislation was not intended to drastically interfere with state proceedings. *See* 130 Cong. Rec. 8891, 8896, 8889 (June 29, 1984) (Statement of Sens. Dole and Hatch). Senator Dole's comments are cited in *In re Pan American Corp.*, 950 F.2d 839, 844 (2nd Cir. 1991), and Senator Hatch's comments are cited in *Mattingly v. Newport Offshore, Ltd.*, 57 B.R. 797 (D.Rh.I. 1986) in which the court observed that: "The legislative history of the [1984 Act], which gave birth to the bewildering array of statutes here at issue, adequately *evinces an abiding concern for continuing to allow state courts to interpret state law" Id.* at 799. *(emphasis added)*. While this is accomplished to some extent by the abstention powers under 28 U.S.C. §1334(c), *see In re White Motor Credit,* 761 F.2d 270, 273 (6th Cir. 1985) (quoting Senator Dole), it is nevertheless apparent from the overall tenor of the debates that while the extent of the jurisdictional grant under §1334(b) should be broad, it was not intended to be a takeover of state court jurisdiction of virtually limitless proportions, as *Celotex, supra,* 115 S.Ct. at 1499, makes clear.

Even with the provisions for abstention under 28 U.S.C. §1334(c), the Sixth Circuit's overly expansive reading of §1334(b) conflicts with the policies and principles of federalism and comity underlying the relationship between the federal and state courts. *See Younger v. Harris,* 401 U.S. 37, 44, 91 S.Ct. 746, 750, 27 L.Ed.2d 669 (1971).

The basic prerequisites for bankruptcy subject matter jurisdiction under 28 U.S.C. §1334(b) are not present in those claims against the nondebtor defendants, which are the subject of this petition, and many other opt out breast implant cases that do not involve or implicate Dow Corning and cannot conceivably impact its reorganization. Unasserted potential claims for contribution

and indemnity do not justify assumption of "related to" jurisdiction under §1334(b). These cases should be left alone for expeditious resolution in the state courts from whence they came and to which they should be remanded, preserving the bankruptcy jurisdiction of the district courts for cases in which there is a demonstrated, not hypothetical, effect on the estates in bankruptcy. As this Court noted in *Celotex,* the bankruptcy court has no jurisdiction over proceedings that have no effect on the debtor.

It is, therefore, wholly propitious for this Court to intervene in order to ensure that the exercise of power under §1334(b) does not produce the limitless jurisdiction warned against in *Pacor* and echoed by this Court in *Celotex.*

(b) Sixth Circuit's Interpretation of 28 U.S.C. §157(b)(5) is Clearly Erroneous.

An independent ground for granting the petition is the Sixth Circuit's holding that 28 U.S.C. §157(b)(5) empowers the district court to order transfer of any "related to" case from anywhere in the country to the district court in the bankruptcy venue. The Sixth Circuit's holding constitutes a plain misreading of the statute that, combined with its expansive reading of "related to" jurisdiction, threatens to undermine the balance struck by Congress in setting forth the powers of courts sitting in bankruptcy and grant to nondebtor parties unprecedented bankruptcy protection without imposing any of the burdens associated with seeking such relief.

The starting point for analysis is, of course, the language of §157(b)(5):

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

The most striking thing about that provision is that the word "transfer" is nowhere to be found in it. The meaning of that plain omission for the nondebtors is that they have no basis in law for the transfers they sought.

Section 157(b)(5) is a venue-setting provision for personal injury tort cases *against the debtor.* This becomes clear from the setting of this provision within §157 as a whole, which deals generally with the division of responsibility between the district and bankruptcy courts. Literally, of course, when §157(b)(5) refers to "personal injury and wrongful death claims" without qualification, it could mean such claims against anyone, anywhere. But it obviously does not mean that. It means non-core proceedings triable by the district court, not the bankruptcy court. *See In re United States Lines,* 128 B.R. 339, 341 (S.D.N.Y 1991). What kind of non-core proceedings? Section 157(b)(2)(B) answers this question: "personal injury tort or wrongful death claims *against the estate." (emphasis added).*

The looser conception of §157(b)(5) has crept into some cases because "transfer" is a perfectly sensible word to apply to the power over cases in which *the debtor* is a defendant. Such cases are automatically *in* bankruptcy court in the fundamental sense that they are held in place by that court by virtue of the automatic stay imposed by Bankruptcy Code §362(a). For those cases, the bankruptcy district court is empowered to say whether they may be tried at all so long as the bankruptcy is pending. It is a rational corollary to grant the power to say *where* they may be tried. In that orderly scheme of things, it is suitable to speak of the venue-setting power of the district court as a power of "transfer." But the notion of a wider power over cases between nondebtors is embraced neither by the statutory language nor by the essential scheme of the relevant Code provisions.

As against the sound understanding that §157(b)(5) refers to "claims against a [bankrupt] estate," the extraordinary power to transfer nondebtor cases from courts throughout the country, both state and federal, is a kind of sweeping authority that would require the most persuasively explicit statutory language. When

Congress meant to provide for transfer only of cases pending in *federal courts,* and then only for purposes of *pretrial handling,* it created a special multi-judge tribunal for the purpose. 28 U.S.C. §1407. There is no persuasive suggestion anywhere that Congress intended to grant the headier power the Respondents claim — to pluck cases out of state and federal courts pending against nondebtors — to any single district judge in bankruptcy cases.

The contrary view pressed by Respondents and adopted by the Sixth Circuit has its judicial origin and principal support in *A.H. Robins Co. v. Piccinin,* 788 F.2d 994 (4th Cir.), *cert. denied,* 479 U.S. 876 (1986), which turns out upon close inspection to be strange authority indeed, notably because no transfer of claims against nondebtors — or even claims against debtor — ultimately was ever authorized or made in that case. It is true that Judge Mehrige ordered transfer there of "related to" cases, but his order to that effect was remanded because the affected parties had not received necessary notice of the proposed transfers. *Id.* at 1015-16. On remand, that notice was never given; the transfers never happened; and the Robins reorganization went forward to completion unimpeded. *See* Richard B. Sobol, *Bending the Law: The Story of the Dalkon Shield Bankruptcy* 66 (1991).

Moreover, the Fourth Circuit's discussion of the transfer issue proceeds entirely upon consideration relating to suits *against the debtor* and does not opine at all about the subject of possible "related" cases against nondebtors. The Fourth Circuit's analysis repeatedly refers to "tort cases against a Chapter 11 debtor" (788 F.2d at 110); transfer of venue "of a case against the bankrupt to another district" (*Id.* at 1016), strongly suggesting that the court simply never focused on the question whether §157(b)(5) was intended to permit transfer of nondebtor claims.

The Sixth Circuit relied heavily on statements in *Robins* that claims against A.H. Robins could not be estimated or a dispute resolution facility established unless all Dalkon Shield claims were physically consolidated in one forum. 86 F.3d at 496-97. But it is undisputed that (1) no cases were ever actually transferred in the *Robins* bankruptcy and (2) the lack of such a transfer had

not a whit of impact on the district court's ability to estimate the value of the Dalkon Shield claims and resolve the bankruptcy by establishing a claims resolution facility. Thus, to the extent the Fourth Circuit in Robins spoke in terms that would stretch the boundaries of §157(b)(5) to achieve a policy goal, it has since become clear that the attainment of that goal is unrelated to any purported need to transfer cases. Estimation and liquidation of pending tort claims are two different things, and only the former need occur in the centralized bankruptcy forum. Even more clearly, it is wholly unnecessary to have claims against *nondebtors* transferred.

In short, the correct reading of 28 U.S.C. §157(b)(5) is a further question of moment adding measurably to the reasons for granting the writ.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN M. O'QUINN
Counsel of Record
RICHARD N. LAMINACK
O'QUINN, KERENSKY,
MCANINCH & LAMINACK
440 Louisiana, Suite 2300
Houston, TX 77002
(713) 223-1000
(713) 236-4870 (fax)

JOSEPH F. RICE
RICHARD L. AKEL
NESS, MOTLEY, LOADHOLT,
RICHARDSON & POOLE
P.O. Box 1137
Charleston, SC 29402
(803) 720-9000
(803) 577-7513 (fax)

VINCENT L. MARABLE III
Paul Webb, P.C.
221 N. Houston
Wharton, TX 77488
(409) 532-5331
(409) 532-2902 (fax)

ATTORNEYS FOR PETITIONERS BREAST IMPLANT TORT CLAIMANTS REPRESENTED BY O'QUINN, KERENSKY, McANINCH & LAMINACK

November 8, 1996